

1982 WL 189484 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

November 8, 1982

**\*1 RE: Proposed Regulations of the South Carolina State Cemetery Board**

Mr. Dave Murday  
Committee Research Assistant  
Medical, Military, Public & Municipal Affairs Committee  
House of Representatives  
Post Office Box 11867  
Columbia, South Carolina 29211

Dear Dave:

You have questioned the validity of several provisions of the rules and regulations proposed by the South Carolina State Cemetery Board and submitted to the General Assembly for its review.

The State Cemetery Board is established pursuant to §§ 39-55-10, *et seq.*, of the South Carolina Code of Laws (1976). The Board's purpose as defined by the legislature is 'to insure the establishment of sound business practices necessary to furnish the perpetual care or endowment care guaranteed.' Section 39-55-10. The Board is authorized to promulgate 'all necessary rules and regulations to effectuate the purposes of this chapter.' Section 39-55-80. Thus, it is clear that the State Cemetery Board has express statutory rule making authority.

The State Supreme Court in [Hunter & Walden Co., Inc. v. South Carolina State Licensing Board for Contractors](#), 272 S.C. 211, 251 S.E.2d 186, 187 (1978), noted:

An administrative regulation is valid as long as it is reasonably related to the purpose of the enabling legislation. [Mourning v. Family Publications Service, Inc.](#), 411 U.S. 356, 93 S.Ct. 1652, 36 L.Ed.2d 318 (1973); 2 Am.Jur.2d, Administrative Law, § 296; 73 C.J.S. Public Administrative Bodies and Procedures, §94.

See also, Davis 2d Ed. Administrative Law, § 7:12, p. 57.

There is little doubt that the enabling act grants the Board the authority to promulgate 'legislative rules' [as well as interpretative rules] which have the force of law and become an integral part of the statute. [Faile v. South Carolina Employment Security Commission](#), 267 S.C. 536, 230 S.E.2d 219 (1976).

Several decisions of the South Carolina Supreme Court qualify an agency's authority to promulgate rules and regulations. The Court has consistently stated that a rule which 'materially alters or adds to the law is void'. [Milliken v. South Carolina Dept. of Labor](#), 275 S.C. 264, 269 S.E.2d 763 (1980). Clearly then, a rule or regulation in conflict with a statute or statutory scheme is void. [Brooks v. South Carolina State Board of Funeral Services](#), 271 S.C. 457, 247 S.E.2d 820 (1978). However, by its very definition, a legislative rule adds to the statutory law and certainly this reason alone does not invalidate it. Apparently, a rule may add to the law as long as it is consistent with the enabling act's scheme and intent and can be characterized as 'implementing' the enforcement scheme rather than creating new legislation. See, [Banks v. Batesburg Hauling Co.](#), 202 S.C. 273, 24 S.E.2d 496 (1943). Each of the questioned provisions will be hereafter addressed and analyzed pursuant to the above discussion of the law.

I.

You have questioned the requirement of R21-2 which requires a notarized application for licensure. The Board is required to issue licenses for perpetual care cemeteries. Section 39-55-80. The requirement of a notarized application is but an amplification of this mandate and would appear to be a reasonable and inexpensive method to gather pertinent credible information prior to issuance of the license.

\*2 R21-2 also proposes a penalty fee of six (6%) percent of the license fee for delinquent applications for renewal. The statute specifies a license fee 'not exceeding \$25', [§ 39-55-80], however, the statute does not address a delinquency penalty. The penalty appears to be a reasonable method to insure timely applications for renewal, a problem experienced in the past. It should be noted, however, that the penalty fee may arguably conflict with the express statutory limitation of the application fee and thus, the validity of the penalty provision is not free from doubt. Cf. Brooks v. State Board of Funeral Services, supra.

## II.

You question whether R21-3 which prescribes a perpetual care trust fund deposit upon the sales of mausoleums, lawn crypt spaces and cremation niches is legally valid. Section 39-55-40 provides:

Whenever any cemetery lot or grave space, wherein perpetual care is promised or guaranteed, is sold by any cemetery, the cemetery shall, within ninety days after the lot or grave space has been paid for, transmit to the trustee for addition to the trust fund referred to in § 39-55-30, the sum of six dollars per grave space or ten percent of the sales price, whichever is greater.

The deposit requirements provided for in R21-3 are reduced from those specified in this statutory provision.

The Board in proposing the reduced deposit schedules recognized, and I think reasonably, that the regulation of mausoleums, etc., is within the province of Chapter 55 Title 39, since they are alternative methods of perpetual care burials. The Board also reasons that maintenance of these alternative methods of burials is generally less expensive than maintenance of the traditional grave spot. However, despite the reasonableness of these differing deposit schedules, they are most probably in conflict with the deposit requirements set forth in § 39-55-40.

## III.

You have questioned whether the Board may authorize license revocations as proposed in R21-9. Clearly, the authority to revoke a perpetual care license would assist in the enforcement of this chapter to insure sound business practices in the perpetual care industry. However, the statutory scheme addresses only the issuance or refusal to issue licenses, not the suspension or revocation thereof. Although this may be a legislative oversight, such authority may not be assumed by regulation. Wagner v. Ezelle, 249 S.C. 421, 154, S.E.2d 731 (1967).

If this office may be of further assistance, please call upon us.

Very truly yours,

Edwin E. Evans  
Senior Assistant Attorney General

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